IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 32 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOMABHAI TERSINGBHAI DAMOR

Versus

STATE OF GUJARAT

Appearance:

MR G RAMAKRISHNAN for Appellant

MR U.R. BHATT, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 31/08/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (" the Code" for short) is directed against judgment dated November 08, 1996 recorded by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.107 of 1996 by which the appellant is convicted of the offences punishable under Section 302 read with 34 IPC as well as Section 323 read with 34 IPC and sentenced to suffer R.I. for life and fine of Rs.200/- in default R.I. for three months for commission of offence punishable under Section 302 read with 34 IPC as well as RI for 15 days and fine of Rs.100/- in default R.I. for 7 days for commission of offence punishable under Section 323 read with 34 IPC. It may be stated that the learned Additional Sessions Judge has directed that substantive sentences imposed on the appellant shall run concurrently and the appellant would be entitled to benefit of set off as postulated by Section 428 of the Code.

2. Complainant Nathabhai Galabhai Damor is resident of village Chitava, Taluka Santrampur, District Panchmahals. At the relevant time, he was serving as a Peon in a Bank. He was staying with his wife Ambaben Nathabhai, his cousin Virsinh, his son Rajeshbhai and one Balwantbhai. A machine installed in the house of complainant Nathabhai had become out of order. Therefore, in order to get it repaired, Virsinh, Rajesh and Balwant had called one Abhaysinh of village Taladara at the house of the complainant. Abhaysinh had tried his best to repair the machine, but could not succeed, and as it was getting late, Virsinh, Rajesh and Balwant had accompanied Abhay to ensure his safe passage to his house. After Abhaysinh had reached his village Taladara, all the three who had accompanied him i.e. Virsinh, Rajesh and Balwant were returning to their house situated in village Chitava. While returning to their house, they had to pass nearby field belonging to one Salubhai. It may be stated that the complainant and his relatives as well as Tersing Damor who is father of the appellant and his relatives belong to one family and had disputes with reference to right to cultivate agricultural lands since long before the incident. When Virsinh, Rajesh and Balwant were passing near the field of Salubhai, the appellant, his father Tersing Damor, his three brothers i.e., Ramesh, Shanabhai and Manilal had formed an unlawful assembly, common object of which was to cause death of Virsinh Akhambhai. In order to achieve this common object, Ramesh had armed himself with a stick whereas the appellant had armed himself with an axe. It is the case of the prosecution that in prosecution of

common object, Tersing Narjibhai and Manilal Tersing had caught hold of deceased Virsinh Akhambhai and the appellant had inflicted axe blow on elbow of deceased whereas his brother Ramesh Tersing had hit the head of the deceased with a stick. Balwant and Rajesh who were with deceased Virsinh were threatened, as a result of which, they had started running towards their house. Rajesh had raised shouts that his uncle Virsinh was being assaulted by the appellant and others. On hearing the shouts, Ambaben, mother of Rajesh, had immediately come out of her house, followed by complainant Nathabhai, who is her husband. Ambaben had attempted to intervene in the incident, but Ramesh Tersing had inflicted stick blows on her back. On commotion being raised, several persons residing nearby had collected at the place of incident and, therefore, the accused had run away. As Virsinh had sustained serious injuries, Nathabhai had called two members of the panchayat at the place of incident. After their arrival at the place of incident, an arrangement was made to summon a jeep from Santrampur, and in the said jeep, Virsinh was removed to Government dispensary at Fathepura. Ambaben was also treated by Medical Officer of the said Hospital. Thereafter Nathabhai had gone to Fathepura Police Station and lodged his complaint, which was registered by Nanjibhai Kanabhai, who was then PSO of the Police Station. PSO of the Police Station had handed over investigation of the complaint of Nathabhai to Javsingbhai Ramjibhai Pargi, who was then Jamadar at the Khedapa Out Post of Fathepura Police Station. Mr.Pargi had visited the place of incident and drawn panchnama of place of incident. He had also recorded statements of Rajesh and Balwant. As injured Virsinh had sustained serious injuries and his condition was deteriorating, Medical Officer of Government Dispensary, Fathepura, had advised to remove him to Godhra Hospital for better treatment. Accordingly the injured was removed to Godhra General Hospital for treatment where he succumbed to his injuries on December 05, 1995. On necessary information being conveyed, offences punishable under Sections 302, 323, 143, 147, 148, 149, 504 IPC as well as Section 135 of the Bombay Police Act were registered against the appellant and others and investigation into FIR of Nathabhai was made by Pramodbhai Fatesinh Gohil who was then PSI of Fathepura Police Station. The Investigating Officer had drawn panchnama of place of occurrence and recorded statements of those persons who were found conversant with the facts of the case. He had made necessary arrangements for sending dead body of the deceased for postmortem examination. Autopsy on the dead body of the deceased was performed by Dr.Naryanbhai Punjabhai Patel.

Three accused i.e. Tersing Narji, the appellant and Manilal Tersing were arrested on December 6, 1995 whereas Rameshbhai and Shanabhai could not be arrested as they were absconding. While in police custody, accused Gemabhai Tersing had made disclosure statement, pursuant to which, axe used by him in commission of crime was discovered. The clothes of the deceased were taken into custody by the Investigating Officer. Incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. On completion of investigation, charge sheet was submitted by the Investigating Officer against three accused i.e. Tersing Narji, Gema Tersing i.e. the appellant and Manilal Tersing because Rameshbhai and his brother Shanabhai were absconding. The Charge sheet was filed in the court of learned Judicial Magistrate, First Class, Santrampur, for commission of offences punishable under Sections 302, 323, 504,143,147, 148, 149 IPC and Section-135 of the Bombay Police Act, 1951. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case against those three accused was committed to Sessions Court, Panchmahals at Godhra for trial, where it was numbered as Session Case No. 107 of 1996.

3. The learned Additional Sessions Judge, Panchmahals at Godhra to whom the case was made over for trial, framed charge against the appellant at Exh. 1, of the offences punishable under Sections 302, 323, 504, 143, 147, 148,149 IPC and Section 135 of the Bombay Police Act,1951. The charge was read over and explained to the appellant and others, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr. Narayanbhai Punjabhai Patel as PW-1 at Exh. 16; (2) Nathabhai Galabhai Damor as PW-2 at 18; (3) Rajeshbhai Nathabhai Damor as PW-3 at Exh.20; (4) Balwantbhai Rumalbhai Damor as PW-4 a Exh. 21; (5) Ambaben Nathabhai as PW-5 at Exh.22; (6) Sardarbhai Surmabhai Damor as PW-6 at Exh. 23; (7) Dr. Chimanbhai Bijiyabhai Charel as PW-7 at Exh.26; (8) Soma Akhma Damor as PW-8 at Exh.29; (9) Nanjibhai Dharjibhai as PW-9 at Exh. 31; (10) Javsinghbhai Ramjibhai Pargi as PW-10 at Exh.32 and (11) Pramodsinh Fatesinh Gohil as PW-11 at Exh.33, to prove its case against the appellant. The prosecution had also produced documentary evidence such as panchnama of place of incident prepared by Jamadar Javsingbhai at Exh.8, panchnama of seizure of clothes of the deceased at Exh.11, postmortem notes of deceased Virsinh at Exh.17; complaint of Nathabhai at Exh. 19, panchnama of place of incident prepared by the Investigating Officer at Exh. 24; injury certificate of

Ambaben Nathabhai at Exh.28 in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required under Section 313 of the Code. In his further statement, the case of the appellant was that he was innocent and a false case was filed against him. However, he had not examined himself on oath or any other witness in support of the defence pleaded by him in his further statement.

5. On evaluation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Virsinh had died a homicidal death. According to learned Judge, testimony of (i) Nathabhai Galabhai Damor, (2) Ambaben Nathabhai, (3) Damor Rajeshbhai Nathabhai, (4) Damor Balwantbhai Rumalbhai and (5) Sardarbhai Surmabhai, was reliable, trustworthy as well as cogent, which established that the appellant had delivered axe blow on elbow of the deceased whereas fatal blow on head of the deceased by means of a stick was delivered by Ramesh Tersing. The learned Judge noticed the medical evidence tendered by Narayanbhai Patel, which established that the injury sustained by the deceased on his head was sufficient in the ordinary course of nature to cause his death. What was deduced by the learned Judge was that it was not proved by the prosecution that the appellant with other accused had formed an unlawful assembly, common object of which was to cause death of deceased Virsinh or cause injury to Ambaben and, therefore, the appellant was not liable to be convicted of the offences punishable under Sections 143, 147, 148 and 149 IPC, but the appellant had shared common intention of other accused Ramesh to cause death of the deceased who had caused death by delivering fatal blow of stick on head of the deceased, as a result of which, he was liable to be convicted of the offence punishable under Section 302 read with 34 IPC. According to the learned Judge it was established by the prosecution that Ramesh had caused simple injuries by stick to witness Ambaben Nathabhai and, therefore, the appellant was liable to be convicted of the offence punishable under Section 323 read with 34 IPC. In view of above referredto conclusions, the learned Judge has convicted the appellant of the offence punishable under Section 302 read with 34 and Section 323 read with 34 IPC and imposed sentences referredto earlier by judgment dated November 08, 1996, giving rise to

instant Appeal.

6. Mr.G. Ramakrishnan, learned Counsel of the appellant contended that evidence on record clearly establishes that attempt is made by the witnesses to rope in falsely, as many persons of family of the appellant, as possible, in the incident and therefore the appellant who was falsely involved in the case, should be acquitted. According to him, chronology of events of incident as narrated by so called eye witnesses differs from witness to witness and as case against the appellant is not satisfactorily established, the appeal should be allowed. What was emphasized was that eye witness Rajesh contradicts eye witness Ambaben regarding presence of eye witness Ambaben at the place of incident and,therefore, unreliable case of prosecution against the appellant should be disbelieved. In the alternative, it was argued that the evidence led by the prosecution does not establish that the appellant had inflicted injury on vital part of body of the deceased and therefore the finding that the appellant had shared common intention to cause death of the deceased is liable to be set aside and at best the appellant would be liable to be convicted under Section 324 IPC as fracture of ribs of deceased was not committed by the appellant and, therefore, also the appeal should be accepted in part.

7. Mr. Uday R. Bhatt, learned Additional Public Prosecutor, contended that the rustic village witnesses have tendered evidence before the court in a straight forward manner and, therefore, their evidence should not be viewed with any suspicion by the Court. According to learned counsel of the State Government, the eye witnesses, except Sardarbhai Surmabhai, were closely related to the deceased and as they would not allow the real culprits to go scot-free or involve the appellant in a serious case falsely, their evidence should be accepted by the Court. What was stressed was that sworn testimony of witness Sardarbhai Surmabhai shows that he is an independent person who is neither interested in the complainant or his relatives nor on inimical terms with the appellant and other accused and as commission of offence as claimed by the prosecution is fully established by his evidence, instant appeal should be dismissed. The learned Counsel pointed out that the so called contradictions and/or omissions brought on record are inconsequential and as they do not affect the substratum of the prosecution case, there is no reason to discard otherwise reliable evidence of eye witnesses. What was emphasized was that the presence of eye witness Ambaben at the place of incident can hardly be doubted as

she herself was injured in the incident and therefore some minor contradictions in the evidence of eye witnesses regarding presence of Ambaben at the place of incident, which are sought to be blown out of proportion, should not weigh with the court. According to the learned counsel of the State Government, the circumstances that (1) the appellant had armed himself with a dangerous weapon like an axe, (2) he and others had intercepted the deceased who was returning home; (3) he had delivered blow with axe on elbow of the deceased who was unarmed; (4) accused Ramesh had delivered fatal blow on the head of the deceased, (5) eye witness Ambaben was prevented by accused Ramesh from intervening when an attempt was made by her to save the deceased and was injured; (6) the appellant had left the place of incident together with Ramesh, etc. would show that the appellant had shared common intention to cause death of the deceased and, therefore, the conviction of the appellant with aid of Section 34 cannot be regarded as erroneous. According to learned counsel of the State Government, weighty reasons have been assigned by the learned Judge of the Trial Court for convicting the appellant of the offence punishable under Sections 302 read with 34 and Section 323 read with 34 IPC and as the learned Counsel of the appellant has failed to dislodge them, the appeal should be dismissed.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and a reasonable probabilities of the case.

9. It may be stated that accused Ramesh Tersing was arrested on November 07, 1996. While in custody, he had made disclosure statement, pursuant to which, stick used by him in commission of crime was discovered by Investigating Officer in presence of panch witnesses. On completion of investigation, charge sheet against him was submitted in the Court of learned Judicial Magistrate, First Class, Santrampur, for commission of offences punishable under Sections 302,323, 504, 143,147, 148, 149, 504 IPC and Section 135 of the Bombay Police Act. As offence punishable under Section 302 is exclusively triable by a Court of Sessions, the case against him was committed to the Sessions Court, Panchmahals at Godhra for trial, where it was numbered as Session Case No. 34 of 1997. Accused Ramesh pleaded not guilty to the charge framed against him and, therefore, prosecution had examined 14 witnesses to prove its case against him. The prosecution had also produced documentary evidence in support of its case against him. On appreciation of

evidence led by the prosecution against him, accused Ramesh was convicted of the offences punishable under Section 302 read with 34 and 323 read with 34 IPC and sentenced to suffer RI for life and fine of Rs. 500/- in default RI for six months for commission of offence punishable under Section 302 read with 34 IPC as well as RI for six months and fine of Rs. 100 in default RI for one month for commission of offence punishable under Section 323 read with 34 IPC by judgment dated October 10, 1997 which was rendered in Session Case No. 34 of 1997. Feeling aggrieved by the above quoted judgment, accused Ramesh Tersing had preferred Criminal Appeal No. 1063 of 1997 before the High Court under Section 374 (2) of the Code of Criminal Procedure, 1973. The said Appeal has been heard and dismissed by this Division Bench vide judgment dated August 26, 2004.

10. The fact that deceased Virsinh died a homicidal death can hardly be disputed. It is not argued by the learned counsel of the appellant that prosecution could not establish that deceased had died a homicidal death. The testimony of eye witnesses clinchingly establishes that the deceased had received injuries on his head and other parts of body. The injuries sustained by the deceased are mentioned in inquest panchnama produced by the prosecution on record of the case at Exh.10. The testimony of Dr. Naryanbhai Patel, who was Medical Officer of General Hospital, Godhra, shows that he had received dead body of the deceased for postmortem examination on December 6 1995, and that he had performed autopsy on the dead body of the deceased. The Doctor has mentioned in detail the external and internal injuries sustained by the deceased, which were noticed by him while performing autopsy on the dead body of the deceased. They are to be found in paragraphs 1 and 2 of his deposition. The injury sustained by the deceased are also detailed in postmortem notes produced on the record of the case at Exh.17. The Medical Officer has specifically stated that all the injuries noticed by him on the dead body of the deceased were antemortem and were possible by stick and axe which were produced as muddamal articles before the court. On the facts and in the circumstances of the case, this Court is of the opinion that the finding recorded by the learned Judge of the Trial Court that deceased died a homicidal death is eminently just and is hereby upheld.

11. In order to prove charges levelled against the appellant, the prosecution has in all examined 5 eye witnesses. They are (1) Nathabhai Galabhai Damor, PW-2 Exh.18 (2) Rajeshbhai Nathabhai Damor, PW-3 Exh.20, (3)

Balwantbhai Rumalbhai Damor, PW-4 Exh.21,(4) injured Ambaben Nathabhai, PW-5, Exh.22, and (5) Sardarbhai Surmabhai Damor, PW-6 Exh. 23. Nathabhai Galabhai Damor whose testimony is recorded at Exh.18 has narrated the whole incident in a simple and straight forward manner. According to him, the deceased was his cousin and was serving as a Peon in the High School situated at village Chitava. It is stated by him that the incident had happened on Saturday and on that day he had returned home at about 6.00 p.m. According to him, he had learnt that Abhaysinh Gemabhai had come to his house for repairing the machine. It is stated by him that Abhaysinh could not repair the machine and as it was getting late, deceased Virsinh and his two sons Rajesh and Balwant had accompanied Abhaysinh to ensure his safe passage to his house situated in village Taladara. According to this witness at about 8.00 p.m. or 8.30 p.m. his sons Rajesh and Balwant had come to his house shouting that their uncle Virsinh was being assaulted and therefore he and his wife Ambaben had gone running to the field of Salubhai, Driver, where deceased was being assaulted. It is stated by him that his wife Ambaben was ahead of him. It is mentioned by the witness that Virsinh was lying on ground and that accused Ramesh had given stick blow to his wife, as a result of which he had raised shouts and, therefore, Arjan, Surji, Raising, etc. had come to his rescue and he was able to save his wife. According to this witness, when his wife was assaulted, at that time, Jesing Tersing, Tersing Nagji, Manilal Tersing, Ramesh Tersing, Gema Tersing (i.e. appellant) and Shana Tersing were present, out of whom, Ramesh had a stick with him whereas Gema had an axe with him whereas others were not armed with any weapons at all. What is maintained by the witness before the court is that all the above referredto persons had left the place of incident after uttering abuses. According to this witness, Rajesh had informed him that the deceased was caught hold of by Manilal and Tersing, whereas Ramesh and Gema were beating him. It is stated by the witness that when they had gone near Virsinh, they had found that he was unconscious and had sustained injury on his head as well as ankle of his left hand. The witness has further stated before the Court that as Virsinh was alive at that time but was not able to speak, he had removed him to Fathepura Dispensary in a jeep where he was treated by Dr. Charel, and Dr.Charel had advised him that injured Virsinh should be removed to Godhra Hospital for better treatment. It is also mentioned by the witness that he had made arrangement to remove Virsinh to Godhra hospital along with other persons and he had lodged complaint at Fathepura Police Station. According to this witness, Virsinh had expired

on December 05,1995. What is maintained by the witness before the Court is that accused and Virsinh had dispute relating to land and, therefore, he was assaulted. The witness has informed the court that when he had gone to Fathepura Police Station to lodge First Information Report, he was informed by Jamadar Nanjibhai that there was a rule that a complaint against five persons cannot be recorded, as a result of which he had argument with him for about two hours and after being frustrated, he had lodged First Information Report against four persons. According to this witness, he had also informed Dy.S.P. Mr.Dave and PSI Mr.Gohil about the stand which was taken by Jamadar Nanjibhai when he had gone to lodge First Information Report.

In his cross-examination, it is stated by the witness that the Police had not recorded the statement as narrated by him and had recorded his complaint only after some argument. It is stated by the witness that when his son and others had gone to village Taladara, it was night time. According to this witness, village Taladara is at a distance of 3 to 4 kms from his village whereas field of Salubhai Driver is situated at a distance of one field from his house, and that it was possible to hear from the field of Salubhai Driver if shout was raised. In cross-examination, it is stated by the witness that before his son had come to his house, they had come out of house and that they had gone to the place of incident running with his son. The suggestion made by the defence that no one was present when he had reached the place of incident, was emphatically denied by him. After stating that at the time of incident there was darkness, it is maintained by the witness that the night was moonlight. According to him, he had raised shouts and made the assailants to run away. The suggestion was made by the defence that he had not seen the incident was emphatically denied by him. During his cross-examination, it is stated by the witness that out of five accused, one was beating his wife whereas four others were hurling abuses. In his cross-examination it is admitted by the witness that he had dispute about land with Tersing. It was asserted by the witness in his cross-examination that it was mentioned by him in his complaint that Rajesh had informed him that the deceased was caught hold of by Manilal and Tersing. The baseless and absurd suggestion made by the defence that this witness had dispute with Virsinh i.e. deceased since long and, therefore, he had killed the deceased was emphatically denied by him. The suggestion that at the place of incident, none of the accused was present was also emphatically denied by this witness. The suggestion

that one son of Tersing was left out from being named in the FIR, and therefore, his name was falsely mentioned later on was emphatically denied by him. In his cross-examination also it was asserted by this witness that as the complaint as narrated by him was not recorded, he had given complaint about the same to D.S.P. and Dy.S.P. in writing. It is mentioned by this witness in cross-examination that he had reached Fathepura Dispensary at about 11.00 p.m. and that Doctor had suggested him that First Information Report regarding incident should be lodged. It was maintained by this witness in his cross-examination also that he had not taken advice of anyone before lodging First Information Report and that he had stated the facts which were witnessed by him. According to this witness, Police Station was quite near to dispensary situated at Fathepura and distance was such which could be covered within 5 to 7 minutes. The suggestion made by the defence that he was cultivating land of the deceased was denied by this witness. What is mentioned by this witness in his cross-examination is that the house of Salubhai is situated at a distance of 100 feet from the place of incident whereas his house is situated at a distance of 1,000 feet from the place of incident. It is also mentioned by the witness that in the house of Salubhai, his nephew Sardar Surambhai was present and had come to the place of incident. The suggestion made by the defence that no shouts were raised by his sons was emphatically denied by this witness. Similarly, the suggestion that no one had beaten his wife with stick was also denied by the witness. It was denied by the witness that he was deposing falsely before the Court.

This is what transpires from the testimony of witness Nathabhai. A bare perusal of his testimony makes it evident that he has unfolded the whole prosecution case and narrated the incident in a simple manner. There are no major contradictions and/or omissions in his evidence which could be brought to the notice of this Court. His testimony gets complete corroboration from medical evidence on record. He also stands corroborated by his complaint which was lodged promptly and without any loss of time. He has not exaggerated the incident nor there are any embellishments in his testimony. Under the circumstances, his testimony inspires confidence of this Court.

12. Similar is the evidence tendered by eye witness Rajeshbhai Nathabhai Damor Exh.20, Balwantbhai Rumalbhai Damor Exh.21 and injured Ambaben Nathabhai Exh.22. All the eye witnesses have corroborated each other in

material particulars. The testimony of eye witnesses have inspired confidence of the learned Judge of the Trial Court who had advantage of observing demeanour of the witnesses. The learned Judge has discussed evidence of witness Rajesh, witness Balwant and witness Ambaben in detail which is quite evident from the judgment impugned in the appeal and, therefore, this court is of the opinion that it is not necessary to reproduce the examination-in-chief as well as cross-examination of witness Rajesh, witness Balwant and witness Ambaben and to unnecessarily burden the judgment. Suffice it to say that this Court has gone through the testimony of all the above named eye witnesses carefully, and nothing could be brought to the notice of the court by the learned counsel of the appellant which would raise doubt about their claim that the appellant had inflicted blow with an axe on the ankle of the deceased whereas accused Ramesh had inflicted fatal blow on the head of the deceased with a stick. Though the learned Counsel of the appellant has brought to the notice of this Court certain contradictions and/or omissions appearing in the evidence of witness Rajesh, witness Balwant and witness Ambaben, it is not necessary to refer to them in detail inasmuch as they do not affect the substratum of the prosecution case at all. At this stage it is worth noticing that sworn reliable testimony of witness Ambaben regarding her injuries gets absolute corroboration from testimony of Dr.Charel examined by prosecution as PW-7 at Exh.26 and certificate of her injuries produced on record at Exh. 28. As it is proved that witness Ambaben had sustained injuries, her presence at the place and time of incident can hardly be doubted. Therefore there should not be any difficulty at all in accepting her evidence. Her evidence clearly establishes that injuries to her were caused by the appellant whereas injuries on the deceased were caused by the appellant with an axe as well as his brother Rameshbhai. Therefore conviction of the appellant under Section 323 read with 34 IPC is well founded and not liable to be disturbed. The plea that the above named eye witnesses including complainant Nathabhai are interested witnesses and, therefore, their evidence should be discarded, is merely stated to be rejected. It is well to remember that the complainant and the deceased who was his cousin were staying together when the incident had taken place. The complainant and others who are close relatives of the deceased, would never allow the real culprits to go scot-free and involve falsely the appellant and others in a serious case. As the testimony of eye witnesses gets ample corroboration from medical evidence on record and other evidence such as panchnama of place of incident, etc. their testimony

deserves to be accepted. In a given case, the court may seek corroboration to the testimony of interested witnesses. However, so far as this case is concerned, the court finds that the testimony of close relatives of the deceased is free from exaggerations and/or embellishments and does not suffer from serious infirmities. Under the circumstances, this court is of the firm opinion that the finding recorded by the leaned Judge that the appellant had delivered an axe blow on the ankle of the deceased whereas accused Ramesh had delivered fatal blow on the head of the deceased with a stick and caused his death deserves to be confirmed on the strength of sworn reliable testimony of above named witnesses.

13. Though this court has decided not to discuss testimony of witness Ambaben, witness Rajeshbhai and witness Balwantbhai in detail, it is proposed to discuss the evidence tendered by witness Sardarbhai Surmabhai because the record shows that he is an independent eye witness and is neither interested in Nathabhai or his relatives nor on inimical terms with the appellant and other accused. The evidence of this witness is recorded at Exh.23. According to this witness, the deceased was residing in his village which is Chitava and he was also knowing all the accused as they were also residing in his village. It is stated by the witness that the place of incident was at a distance of 100 feet from his house, but according to him, the incident had taken place at about 8.30 p.m. and at that time he was in his house. It is mentioned by the witness that he had come out of his house and found that the appellant was hurling abuses at the deceased and that the appellant, his brother Ramesh, his brother Manilal and his father Tersing were beating the deceased. According to this witness, the deceased was lying on the ground and at that time the appellant was armed with an axe whereas Ramesh was armed with a stick. It is specifically mentioned by this witness before the court that the appellant had given blow with an axe on ankle of left hand of the deceased whereas accused Ramesh had given stick blow on the head of the deceased. It is stated by the witness that he had witnessed the incident as he had come out of his house. According to this witness, the deceased was accompanied by Rajesh and Balwant and after some time Ambaben had come running to the place of incident followed by her husband Nathabhai. It is mentioned by the witness that accused Ramesh had given stick blow on the back of Ambaben and after some time village people had come and, therefore, he had also gone to the place of incident. According to him, he had found that the deceased had

become unconscious.

In his cross-examination, it was stated by the witness that the plantation was at a distance of 100 feet from his house and there was no crop of tuver in the field. According to him what prompted him to come out of his house was abuses which were being uttered. The suggestion made by the defence that the assailants had run away before he had come to the place of incident was emphatically denied by him. The further suggestion made by the defence that Rajesh and Balwant had taken shelter in his house was also denied by him. It is maintained by the witness before the court that he had stated in his police statement that he had come out of his house on hearing abuses. The suggestion made by the defence that the incident had taken place at midnight, was also emphatically denied by him. Though it was admitted by the witness that at the time of incident, there was darkness, it was mentioned by the witness that he had seen that there was a small crowd but Virsinh was not visible. According to him, the crowd consisted of four persons and as shouting and hurling of abuses had taken place, he himself was scared. The suggestion made by the defence that the deceased was not beaten by Tersing and his sons, was emphatically denied by this witness. It was also denied by the witness that all had run away within a minute on his coming out of his house. According to him, he had not intervened in the incident because he himself was scared. The suggestion made by the defence that on witnessing assault, he was scared and had gone back to his house, was also denied by the witness.

This is what transpires from the testimony of this witness. A bare perusal of the testimony of this witness indicates that this witness has also narrated the incident in natural manner without exaggerating anything. It could not be even remotely suggested by the defence that this witness was either interested in Nathabhai or his relatives or was on inimical terms with the appellant and his relatives. The testimony of this witness gets ample corroboration from other eye witnesses examined by the prosecution. His testimony also gets complete corroboration from medical evidence on record regarding injuries sustained by the deceased as well as injuries sustained by injured Ambaben. As presence of this witness in his house was natural and as he had ample opportunity to witness the incident, this court is of the opinion that his testimony must be accepted more particularly when no infirmities in his evidence are pointed out to the court by the learned Counsel of the

appellant. Thus, testimony of this witness also establishes the case of the prosecution against the appellant fully.

14. The testimony of Dr. Naryanbhai Patel would show that the injury caused on the head of the deceased was sufficient in the ordinary course of nature to cause his death. It is relevant to notice that first of all, the deceased was assaulted by the appellant with an axe and thereafter accused Ramesh had delivered a fatal blow on the head of the deceased with great force. The blow was given with such a great force that there was fracture of right parietal bone of skull, as a result of which, intracranial haemorrhage had taken place. The medical evidence would show that fracture on right parietal bone was linear in nature and was extending from middle of skull to left ear. There is no manner of doubt that grave injury was caused by accused Ramesh on the head of the deceased which had proved fatal. It is well to remember that the deceased was totally unarmed and had offered no provocation to any one worth the name. It is nobody's case that the injury inflicted by the appellant on the head of the deceased was accidental in the sense that the blow was aimed on some other part of his body and because of supervening event, like sudden intervention of someone or movement of the deceased, the lathi had struck on the head of the deceased. There is no manner of doubt that it was the intention of the appellant and accused Ramesh to cause those very injuries which were ultimately found by the Medical Officer while performing autopsy on the dead body of the deceased. The medical evidence clinchingly establishes that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death and, therefore, the conviction of the accused Ramesh and the appellant under Section 302 read with 34 IPC cannot be regarded as erroneous. When an injury is not found to be accidental and is caused on vital part of body with a great force which results into fracture of parietal bone and the injury is found to be sufficient in the ordinary course of nature to cause death of the injured, the offence would be one punishable under Section 302 IPC and not one punishable under Section 304 IPC. The testimony of the witnesses and more particularly that of Rajeshbhai Nathabhai and Balwantbhai Rumalbhai would show that the appellant as well as his brothers and father were waiting for the deceased to return. Accused Ramesh had armed himself with a stick whereas the appellant had armed himself with an axe. They had mounted attack on the deceased jointly and scared away Rajesh as well as Balwant. Further, they had prevented Ambaben from

intervening in the incident when an attempt was made by her to save the deceased. Testimony of witness Nathabhai would show that the appellant was hurling abuses at him. The appellant had run away with accused Ramesh when complainant and others had reached at the place of incident. Having regard to all these relevant facts and circumstances, there is no manner of doubt that the common intention of accused Ramesh and the appellant was to cause death of the deceased and cause injury to a person who was intending to save the deceased. Thus, the evidence clinchingly establishes that the appellant had shared the intention of accused Ramesh. Therefore, invocation of Section 34 IPC cannot be regarded as illegal.

15. The net result of above discussion is that this Court does not find that the conviction of the appellant of the offence punishable under Section 302 read with 34 or 323 read with 34 is in any manner erroneous. No ground is made out by the learned Counsel of the appellant to interfere that the impugned judgment and, therefore, the appeal which lacks merits is liable to be dismissed.

16. For the foregoing reasons, the appeal fails and is dismissed. Mudammal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(J.R. Vora, J.)

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